Supreme Court, U.S.
FILED
MAR 21 1991
OFFICE OF THE CLERK

NO. 90-1293

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

GENE SCROGGY, WARDEN,
Petitioner,

-vs-

PAUL KORDENBROCK,
Respondent,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATES OF ARIZONA, ALABAMA, ALASKA, KANSAS, MAINE, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, WEST VIRGINIA, AMICI CURIAE IN SUPPORT OF PETITIONER

GRANT WOODS
Attorney General of
the State of Arizona

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section

BARBARA A. JARRETT
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602)542-4686

Attorneys for AMICI CURIAE

Honorable James H. Evans
Attorney General of Alabama
State House, 11 South Union Street
Montgomery, Alabama 36130

Honorable Charles E. Cole
Attorney General of Alaska
State Capitol
Post Office Box K
Juneau, Alaska 99811-0300

Honorable Robert T. Stephan
Attorney General of Kansas
Judicial Center - Second Floor
Topeka, Kansas 66612

Honorable Michael Carpenter*
Attorney General of Maine
Office of the Attorney General
State House
Augusta, Maine 04330

Honorable Scott Harshbarger
Attorney General of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108

Honorable Frank J. Kelley
Attorney General of Michigan
Law Building
525 West Ottawa, Post Office Box 30212
Lansing, Michigan 48909

Honorable William L. Webster
Attorney General of Missouri
Supreme Court Bldg., 101 High Street
Jefferson City, Missouri 65102

Honorable Marc Racicot
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620

---

*The State of Maine joins only in Argument I of the Amici Brief.

Honorable Frankie Sue Del Papa
Attorney General of Nevada
Heroes Memorial Bldg., Capitol Complex
Carson City, Nevada 89710

Honorable John P. Arnold
Attorney General of New Hampshire
State House Annex
25 Capitol Street
Concord, New Hampshire 03301-6397

Honorable Robert J. Del Tufo
Attorney General of New Jersey
Richard J. Hughes Justice Complex, CN080
Trenton, New Jersey 08625

Honorable Lacy H. Thornburg
Attorney General of North Carolina
Dept. of Justice, 2 East Morgan Street
Raleigh, North Carolina 27602

Honorable Ernest D. Preate, Jr.
Attorney General of Pennsylvania
Office of the Attorney General
Strawberry Square
Harrisburg, Pennsylvania 17120

Honorable T. Travis Medlock
Attorney General of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

Honorable Mark Barnett
Attorney General of South Dakota
500 East Capitol
Pierre, South Dakota 57501-5070

Honorable Mario J. Palumbo
Attorney General of West Virginia
State Capitol
Charleston, West Virginia 25305

Questions Presented

1. Did the Sixth Circuit err in applying the Chapman v. California harmless-error test for constitutional error to the erroneous admission of respondent's Miranda-violative confession, where the error in question was nonconstitutional?

2. Is there any basis for a reviewing court to refuse to apply a harmless-error analysis to the erroneous admission of evidence for the sole reason that the case in which it was admitted is a capital case?

3. Should this Court adopt the Stone v. Powell rationale to preclude relitigation of Miranda issues in federal habeas proceedings where a state prisoner had a full and fair opportunity to litigate his Miranda claims in state court?

4. Was the Sixth Circuit in error in determining that respondent's Miranda-violative confession was not harmless error, where the confession should have been admissible to impeach the "testimony" respondent gave to the jurors by way of his opening statement?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI	1
STATEMENT OF THE CASE	1
ARGUMENT	
I	
THE SIXTH CIRCUIT ERRED IN APPLYING THE CHAPMAN V. CALIFORNIA TEST TO THE ERRONEOUS ADMISSION OF RESPONDENT'S MIRANDA-VIOLATIVE CONFESSION, AS IT SHOULD HAVE APPLIED THE HARMLESS-ERROR TEST FOR NONCONSTITUTIONAL ERRORS TO THE ERROR IN QUESTION.	9
II	
THERE IS NO BASIS FOR A REVIEWING COURT TO REFUSE TO APPLY A HARMLESS-ERROR ANALYSIS TO THE ERRONEOUS ADMISSION OF EVIDENCE FOR THE SOLE REASON THAT THE CASE IN WHICH IT WAS ADMITTED IS A CAPITAL CASE.	14
III	
THIS COURT SHOULD TAKE THIS OPPORTUNITY TO APPLY THE STONE V. POWELL RATIONALE TO PRECLUDE RELITIGATION OF MIRANDA ISSUES IN FEDERAL HABEAS PROCEEDINGS WHERE A STATE PRISONER HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS MIRANDA CLAIMS IN STATE COURT.	18

IV

THE SIXTH CIRCUIT ERRED IN DETERMINING THAT RESPONDENT'S MIRANDA-VIOLATIVE CONFESSION WAS NOT HARMLESS ERROR, AS THE CONFESSION SHOULD HAVE BEEN ADMISSIBLE TO IMPEACH THE "TESTIMONY" RESPONDENT GAVE TO THE JURORS BY WAY OF HIS OPENING STATEMENT. 26

CONCLUSION 32

TABLE OF AUTHORITIES

Cases:	Page
Bryant v. Vose 785 F.2d 364 (1st Cir. 1986)	10
Chapman v. California 386 U.S. 18 (1967)	2,7,9,10,14, 15,16,18,32
Clemons v. Mississippi 494 U.S. ___ 110 S. Ct. 1441 108 L.Ed.2d 725 (1990)	16,17
Delaware v. Van Arsdall 475 U.S. 673 (1986)	31
Duckworth v. Eagan 492 U.S. ___ 109 S. Ct. 2875 (1989)	23
Harrington v. California 395 U.S. 250 (1969)	9
Harris v. New York 401 U.S. 222 (1971)	2,26,27,30,31
Harryman v. Estelle 616 F.2d 870 (5th Cir. 1980)	11
Howard v. Pung 862 F.2d 1348 (8th Cir. 1988)	10
Kotteakos v. United States 328 U.S. 750 (1946)	3,10
Martin v. Wainwright 770 F.2d 918 (1985)	11
Miller v. Fenton 474 U.S. 104 (1985)	23

Miranda v. Arizona
384 U.S. 436 (1966) 1,2,4,5,7,8,9,10 11,12,13,14,17,18, 19,20,21,22,23,25, 26,27,28,29,30,31,32

Oregon v. Elstad
470 U.S. 298 (1985) 12,13

Pennsylvania v. Muniz
496 U.S. ___
110 S. Ct. 2638 (1990) 11

Satterwhite v. Texas
486 U.S. 249 (1988) 17

Stone v. Powell
428 U.S. 465 (1976) 1,21,22,25

United States v. Lane
474 U.S. 438 (1986) 10

United States v. Johnson
816 F.2d 918 (3rd Cir. 1987) 10

United States v. Mechanik
475 U.S. 66 (1986) 10

United States v. Ramirez
710 F.2d 535 (9th Cir. 1983) 11

Constitution, Statutes, and Rules:

United States Constitution:
Amendment IV 21,22,25

28 U.S.C. § 2254 1,20

Kentucky R.Cr. 9.42(b) 5

INTEREST OF AMICI

Amici represent the states in numerous federal habeas proceedings initiated by state prisoners pursuant to 28 U.S.C. § 2254. In many of those proceedings, state prisoners raise claims pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), even though such claims were fully and fairly litigated during the proceedings in state court, at either the trial level, or on appeal. Often, the federal courts set aside valid state convictions and order amici to retry state prisoners because Miranda-violative confessions were erroneously admitted at their state court trials. Amici have an interest in obtaining a ruling from this Court applying the rationale of its decision in Stone v. Powell, 428 U.S. 465 (1976), to Miranda claims that are urged as a basis for relief in federal habeas proceedings filed by state prisoners.

Amici prosecute numerous cases in which defendants in state prosecutions allege that

their confessions were obtained in violation of Miranda v. Arizona. Amici have an interest in resolving the use that may be made of such confessions to rebut the self-serving statements that defendants often make at trial, where the statements made at trial are inconsistent with the Miranda-violative confessions. While it is clear that a defendant who testifies inconsistently with his Miranda-violative confession may be impeached with his prior confession, Harris v. New York, 401 U.S. 222 (1971), it is not clear whether Harris would allow such impeachment when the defendant does not actually testify at trial, but is allowed pursuant to a state's procedural rule to present his unsworn testimony to the jurors by way of an opening statement.

Finally, amici have an interest in the Court's determination what standard applies to the erroneous admission of Miranda-violative confessions--the standard set forth by this Court in Chapman v.

California, 386 U.S. 18 (1967), for errors of constitutional dimension, or a standard similar to the one set forth in Kotteakos v. United States, 328 U.S. 750 (1946), for nonconstitutional errors. Further, amici prosecute numerous capital cases, and the Court's resolution of the question whether it is error for reviewing courts to refuse to apply a harmless-error analysis in a capital case will affect those cases.

STATEMENT OF THE CASE

Following respondent's arrest for murder, attempted murder, and robbery, state police officers advised him of his constitutional rights, pursuant to the provisions of Miranda v. Arizona, 384 U.S. 436 (1966). Respondent waived his Miranda rights, and confessed shooting both victims in the head in the course of a robbery. At a later point in the interrogation, respondent indicated several times that he wished to stop the questioning and resume it the next day. The police continued to question respondent, and he subsequently admitted that he shot the two victims in the head so that they would not get up. Respondent signed a written confession in which he admitted his guilt of the murder, attempted murder, and robbery, and in which he admitted shooting the victims so that they would not get up.

Prior to his murder trial, respondent moved to suppress his written confession on

the ground that it had not been voluntarily made. He also claimed that his confession had been obtained in violation of Miranda because the police refused to honor his requests to terminate the interrogation. The state court conducted a suppression hearing. After hearing evidence bearing on the voluntariness and Miranda issues, including respondent's testimony, the trial court denied his motion to suppress his written confession.

At trial, the prosecutor advised the jurors during his opening statement that respondent had confessed to the murder. (It is undisputed that respondent's basic admission that he shot the victims in the head as they lay face down on the floor was made prior to the Miranda violation.) Although respondent was represented by counsel, he gave his own opening statement. Pursuant to Kentucky procedural rule R.Cr. 9.42(b), "the defendant or his attorney may state his defense and the evidence upon

which he relies to support it." In his opening statement, respondent admitted killing the victim, but claimed that he was under the influence of drugs when he did so. The prosecutor introduced respondent's written confession in evidence during the Commonwealth's case-in-chief. Respondent was convicted of murder, attempted murder, and robbery, and he was ultimately sentenced to death for the murder.

Respondent appealed his murder conviction and death sentence to the Kentucky Supreme Court. On appeal, he contended that the trial court erred in allowing the prosecutor to introduce the written confession in evidence, claiming that it was an involuntary confession, and that it had been obtained in violation of Miranda, because the police who interrogated him had failed to honor his requests to terminate the interrogation. The Kentucky Supreme Court held that both of the above claims of error were void of merit, and affirmed

respondent's murder conviction and death sentence.

Respondent then raised his voluntariness and Miranda claims in a federal habeas proceeding. Although the state court had afforded respondent a full and fair evidentiary hearing on those claims, the district court conducted a de novo evidentiary hearing on them. At the conclusion of that hearing, the district court determined that respondent's confession had been voluntarily made, but found that it was obtained in violation of Miranda because the police had not honored his requests to terminate the interrogation. The district court held, however, that the Miranda violation did not require a reversal of respondent's murder conviction or death sentence because admission of the written confession was harmless beyond a reasonable doubt pursuant to Chapman v. California, 386 U.S. 18 (1967).

Respondent appealed the district court's denial of habeas relief to the Sixth Circuit Court of Appeals. A three-member panel of the Sixth Circuit agreed with the district court's determination that admission of the Miranda-violative confession was harmless error. Respondent moved for a rehearing en banc, and the Sixth Circuit granted his request. In an en banc opinion, a divided court held that the Miranda violation was not harmless beyond a reasonable doubt, either at trial or at sentencing. The court vacated the judgment of the district court and remanded the case to that court with instructions to issue the writ of habeas corpus, and to give petitioner time to retry respondent.

Petitioner filed a timely petition for writ of certiorari in this Court, invoking this Court's jurisdiction in this matter. Petitioner contends that the en banc panel of the Sixth Circuit incorrectly determined that the erroneous admission of respondent's

Miranda-violative confession was not harmless error. Amici agree with petitioner that the en banc panel of the Sixth Circuit was in error in overruling the judgments of the district court and the three judge panel of the Sixth Circuit on the harmless-error question, and submit this amici curiae brief for the purpose of presenting other related issues for this Court's consideration.

ARGUMENT

I

THE SIXTH CIRCUIT ERRED IN APPLYING THE CHAPMAN V. CALIFORNIA TEST TO THE ERRONEOUS ADMISSION OF RESPONDENT'S MIRANDA-VIOLATIVE CONFESSION, AS IT SHOULD HAVE APPLIED THE HARMLESS-ERROR TEST FOR NONCONSTITUTIONAL ERRORS TO THE ERROR IN QUESTION.

In 1967, this Court adopted the general rule that a constitutional error does not automatically require reversal of a conviction, if it can be said beyond a reasonable doubt that the error did not contribute to the verdict of guilt. Chapman v. California, 386 U.S. 18

(1967); Harrington v. California, 395 U.S. 250 (1969). However, a nonconstitutional error does not entitle a defendant to a reversal of his conviction unless he can show that such error had a substantial impact upon the verdict, or that he was prejudiced by the error. United States v. Lane, 474 U.S. 438 (1986); United States v. Mechanik, 475 U.S. 66 (1986); see Kotteakos v. United States, 328 U.S. 750 (1946). This Court has recognized that the onerous Chapman standard does not apply to nonconstitutional errors. United States v. Lane, 474 U.S. at 446 n.9.

Although this Court has never specifically held that the erroneous admission of Miranda-violative confessions are subject to a harmless-error analysis, lower courts have uniformly ruled that they are. Howard v. Pung, 862 F.2d 1348, 1351 (8th Cir. 1988), cert. denied, 109 S. Ct. 3247

(1989); United States v. Johnson, 816 F.2d 918, 923 (3rd Cir. 1987); Bryant v. Vose, 785 F.2d 364, 367 (1st Cir.), cert. denied, 477 U.S. 907 (1986); Martin v. Wainwright, 770 F.2d 918, 932 (1985), modified, 781 F.2d 185 (11th Cir.), cert. denied, 479 U.S. 909 (1986); United States v. Ramirez, 710 F.2d 535, 542-43 (9th Cir. 1983); Harryman v. Estelle, 616 F.2d 870, 875 (5th Cir.) (en banc), cert. denied, 449 U.S. 860 (1980). Further, this Court recently remanded a case to the state court for a determination whether the admission of a defendant's statements obtained in violation of Miranda was harmless error. Pennsylvania v. Muniz, 496. U.S. ___, ___, 110 S. Ct. 2638, 2652 n. 22 (1990). Thus, it appears that this Court has at least tacitly acknowledged that a harmless-error analysis is appropriate when a confession that was obtained in violation of Miranda has been erroneously admitted in evidence at trial.

In the present case, the district court, a three-member panel of the Sixth Circuit, and the en banc panel of the Sixth Circuit all applied the Chapman harmless-error analysis to the erroneous admission of respondent's Miranda-violative confession. Application of that rule presupposes that an error of constitutional dimension has occurred. However, a Miranda violation is not an error of constitutional dimension. As this Court stated in Oregon v. Elstad, 470 U.S. 298 (1985):

> The Miranda exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of compelled testimony. Failure to administer Miranda warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under Miranda. Thus, in the individual case, Miranda's

> preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.

Elstad, 470 U.S. at 306-07 (footnote omitted) (citations omitted). It is undisputed that respondent did not suffer any identifiable constitutional harm, as the state trial court, the Kentucky Supreme Court, the district court, and a three-member panel of the Sixth Circuit all rejected his contention that his Miranda-violative confession was involuntary.[1] Thus, the Miranda violation should have been subject to the test for nonconstitutional error, rather that to the stringent analysis reserved for error of constitutional dimension. Amici submit that this Court should grant certiorari in this case in order to

---

1. The en banc panel of the Sixth Circuit found it unnecessary to address the question whether respondent's written confession was involuntary, since it determined that he was entitled to habeas relief based upon the Miranda violation. (Pet. Appendix at A-16.)

address the question whether a Miranda violation is subject to the stringent Chapman analysis for harmless error, or whether a less stringent harmless-error analysis would be appropriate.

II

THERE IS NO BASIS FOR A REVIEWING COURT TO REFUSE TO APPLY A HARMLESS-ERROR ANALYSIS TO THE ERRONEOUS ADMISSION OF EVIDENCE FOR THE SOLE REASON THAT THE CASE IN WHICH IT WAS ADMITTED IS A CAPITAL CASE.

In overruling the determinations of the district court and a three judge panel of the Sixth Circuit that the erroneous admission of respondent's Miranda-violative confession was harmless error, an en banc panel of the Sixth Circuit held, in a divided opinion, that admission of the confession was not harmless beyond a reasonable doubt. Seven judges joined in the judgment, and six judges dissented. Of the seven judges who joined in the judgment, it appears that two of the judges

erroneously believed that application of the Chapman harmless-error rule to an error committed at trial or at sentencing in a capital case is improper:

> DAVID A. NELSON, Circuit Judge, concurring, joined by Judge RYAN. Like Chief Judge Merritt, I am not satisfied beyond a reasonable doubt that suppression of the tainted portions of the appellant's confession would have made no difference in the vote of any member of the jury. My doubt extends to the jury's resolution of both the question whether the appellant was guilty of premeditation and the question whether he should be sentenced to death.
>
> The untainted evidence against the appellant was very strong, as the dissents of Judges Kennedy and Krupansky persuasively demonstrate, and if this had not been a capital case, I would have been quite willing to invoke the harmless error rule. Death cases can be different for jurors as well as for judges, however, and it seems to me that a jury that wanted to know whether the appellant could be sentenced to life imprisonment without possibility of parole (an option not available under Kentucky law) might very well have settled for life imprisonment with a possibility of parole had it not been for the emotional impact of the appellant's written statement.

(Pet. Appendix A-88)(footnote omitted) (emphasis added). It is apparent from the above language that Judges Nelson and Ryan were unwilling to apply the harmless-error test set forth by this Court in Chapman to the erroneous admission of respondent's Miranda-violative confession simply because this case is a capital case. Or, if they did apply the harmless-error analysis, they placed an additional burden on the Commonwealth of Kentucky to demonstrate harmless error beyond any doubt because the error occurred in the context of a capital case.

Amici submit that Judges Nelson and Ryan erred in refusing to apply the harmless-error rule in this case, as this Court has held in other capital cases that it is appropriate to apply a harmless-error analysis to errors of constitutional dimension that occur in the course of a capital case. Clemons v.

Mississippi, 494 U.S. ___, 110 S. Ct. 1441, 108 L.Ed.2d 725 (1990) (harmless-error rule may be applied by appellate court to uphold death penalty where trial court erred in finding one of two aggravating circumstances); Satterwhite v. Texas, 486 U.S. 249 (1988)(holding Sixth Amendment violation of right to counsel at penalty phase subject to harmless-error analysis, although not harmless as to defendant).

This Court has made it clear in both Clemons and Satterwhite that there is no prohibition to the application of a harmless-error analysis to constitutional errors that occur in a capital case. Since that is true, the two members of the Sixth Circuit en banc panel who refused to apply such an analysis to a nonconstitutional Miranda violation were in error. This Court should grant the petition for writ of certiorari for the purpose of instructing the lower federal

courts that they are required to apply the Chapman analysis, or other appropriate harmless-error test, to the erroneous admission of confessions obtained in violation of Miranda, whether such errors occur in capital cases or in non-capital cases.

III

THIS COURT SHOULD TAKE THIS OPPORTUNITY TO APPLY THE STONE V. POWELL RATIONALE TO PRECLUDE RELITIGATION OF MIRANDA ISSUES IN FEDERAL HABEAS PROCEEDINGS WHERE A STATE PRISONER HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS MIRANDA CLAIMS IN STATE COURT.

Respondent murdered the victim in this case and attempted to murder a second victim over eleven years ago by shooting them in the head, execution style, as they lay face down on the floor. After his arrest, respondent was advised of his rights, pursuant to Miranda, and he waived them. He orally confessed his guilt of the murder to the police officers who interrogated him. He

subsequently signed a written confession admitting his guilt.

At respondent's murder trial in state court, he challenged the admissibility of his written confession on the ground that it was involuntary, and on the ground that it was obtained in violation of Miranda. Respondent testified at the evidentiary hearing and contended that he had requested the police to terminate the interrogation, and that they had refused to do so. The trial court, who was in the best position to assess the credibility of both respondent and the officers who had interrogated him, rejected respondent's challenge to the admission of his written confession, and the Commonwealth of Kentucky introduced it in evidence at trial. On appeal, respondent reurged his claims that the confession was involuntary, and that it was inadmissible pursuant to Miranda because the police had not honored his

requests to terminate the interrogation. The Kentucky Supreme Court addressed the merits of the voluntariness and Miranda issues, and held that they were both void of merit.

Having failed to obtain relief in state court on the above claims of error, respondent raised them in a petition for writ of habeas corpus in the federal district court, pursuant to 28 U.S.C. § 2254. The district court afforded respondent a de novo evidentiary hearing on his voluntariness and Miranda claims. At the conclusion of that hearing, the district court determined that there had been a violation of Miranda because the police had not honored respondent's requests to terminate the interrogation, which he made sometime after his initial admission that he had killed the victim.

Amici request this Court to grant the petition for writ of certiorari in order to squarely address the question whether

Miranda claims are properly cognizable in a federal habeas proceeding, or whether the rationale of Stone v. Powell, 428 U.S. 465 (1976), should apply to bar such claims. Amici contend that Stone v. Powell should apply.

In Stone v. Powell, this Court held that, where a state prisoner had a full and fair opportunity to litigate his Fourth Amendment claim in state court, such a claim would no longer serve as a basis for obtaining federal habeas relief on the ground that illegally obtained evidence was introduced at the state trial. 428 U.S. at 494. In so ruling, this Court recognized that the costs of the exclusionary rule are high, in that it keeps from the jury highly probative evidence bearing on a defendant's guilt or innocence of the crime charged. 428 U.S. at 489-91. Although the Court recognized that the purpose for the exclusionary rule, its deterrent effect,

is served by making illegally-obtained evidence inadmissible in the state's case-in-chief, it recognized that the application of the exclusionary rule to Fourth Amendment violations on federal habeas has no real deterrent effect, and that it violates principles of federalism and finality in the criminal law. 428 U.S. at 492-93. Thus, pursuant to Powell, unless a state court has refused to provide a defendant in a criminal case at least the opportunity to fully and fairly litigate his Fourth Amendment claim, such a claim is no longer cognizable in a federal habeas proceeding. 428 U.S. 494-96.

Amici submit that the rationale for this Court's ruling in Stone v. Powell should be applied to Miranda claims. While a state prisoner should still be allowed to challenge the voluntariness of his confession in a habeas proceeding, since the federal courts review such

claims de novo, Miller v. Fenton, 474 U.S. 104, 110 (1985), there is no valid reason for federal courts to relitigate Miranda claims that have been fully and fairly litigated in state court. As Justice O'Connor noted in her concurring opinion in Duckworth v. Eagan, 492 U.S. ___, 109 S. Ct. 2875 (1989):

> Relitigation of Miranda claims offers little or no additional structural incentive to the police to abide by the dictates of that decision. The awarding of habeas relief years after conviction will often strike like lightning, and it is absurd to think that this added possibility of exclusion years after the police conduct at issue will have any appreciable effect on police training or behavior. As Judge Friendly wrote: "The mere failure to administer Miranda warnings . . . creates little risk of unreliability, and the deterrent value of permitting collateral attack goes beyond the point of diminishing returns." Friendly, Is Innocence Irrelevant?, Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 163 (1970). On the other hand, the costs of suppression in the federal habeas setting are significantly magnified. As in this case, lower federal courts often sit in "review" of the judgments of the highest courts of

> a state judicial system. This situation has always been a flashpoint of tension in the delicate relationship of the federal and state courts, and this exercise of federal power should not be undertaken lightly where no significant federal values are at stake. Perhaps most troubling is the cost to society in the efficient enforcement of its criminal laws. Excluding probative evidence years after trial, when a new trial may be a practical impossibility, will often result in the release of an admittedly guilty individual who may pose a continuing threat to society. While federal courts must and do vindicate constitutional values outside the truth seeking function of a criminal trial, where those values are unlikely to be served by the suppression remedy, the result is positively perverse. Exclusion in such a situation teaches not respect for the law, but casts the criminal system as a game, and sends the message that society is so unmoved by the violation of its own laws that it is willing to frustrate their enforcement for the smallest of returns. If Stone v. Powell bars relitigation of allegations of constitutional violations on federal habeas, it seems to me clear that its rationale is directly applicable to relitigation of nonconstitutional claims under Miranda.

492 U.S. at ___, 109 S. Ct. at 2884.

As stated previously, the Miranda violation in the present case was a nonconstitutional error. It was inappropriate for the district court to relitigate respondent's Miranda claim where he had a full and fair opportunity to litigate that issue both at trial and on direct appeal in state court. Although the federal court disagreed with the state court findings of fact in regard to respondent's Miranda claim, it did not determine that there was any doubt regarding his guilt or the probative value or voluntariness of his confession. For the same reasons this Court held in Stone v. Powell that Fourth Amendment claims are not subject to relitigation in a federal habeas proceeding, it should hold that Miranda claims, that do not call into question the voluntariness of a confession, are likewise not subject to relitigation in a federal habeas proceeding.

IV

THE SIXTH CIRCUIT ERRED IN DETERMINING THAT RESPONDENT'S MIRANDA-VIOLATIVE CONFESSION WAS NOT HARMLESS ERROR, AS THE CONFESSION SHOULD HAVE BEEN ADMISSIBLE TO IMPEACH THE "TESTIMONY" RESPONDENT GAVE TO THE JURORS BY WAY OF HIS OPENING STATEMENT.

In Harris v. New York, 401 U.S. 222 (1971), this Court held that a defendant who testifies at trial may be impeached with an inconsistent Miranda-violative confession, even though the state is precluded from introducing such a confession against him in its case-in-chief. As this Court noted in that opinion:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third

> person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.
>
> The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.

Harris v. New York, 401 U.S. at 225-26.

In the present case, respondent did not testify at trial, thus the prosecutor had no opportunity to either cross-examine him, or impeach him with his Miranda-violative confession. However, respondent availed himself of the opportunity provided by Kentucky procedural law to personally give his opening statement to the jurors, rather than to leave that task to his trial counsel. In his opening statement, respondent candidly admitted to the jurors that he had killed the victim. He

then went on to make a number of self-serving statements that were in part inconsistent with his now-determined Miranda-violative confession. For example, respondent never contended in either his oral confession to the police, or in his written confession, that he was under the influence of drugs when he shot the victim. In his statement to the jurors, however, respondent claimed that he had taken so many drugs prior to the shooting that he did not know what he was doing. Thus, while respondent's Miranda-violative confession and his opening statement, or in-court confession, to the jurors were consistent in most regards, they were inconsistent in regard to a fact that bore on the question whether respondent intended to kill the victim when he shot him.

If the trial court had agreed with respondent that his confession to the police was inadmissible because it was

taken in violation of Miranda, the prosecutor would necessarily have been precluded from introducing the written confession in its case-in-chief. However, the prosecutor would have been allowed to introduce in the Commonwealth's case-in-chief respondent's basic confession of guilt, since it was made orally prior to the Miranda violation. The prosecutor would also have been allowed to impeach respondent with his written confession if respondent had testified at trial rather that presenting to the jurors his unsworn testimony in the opening statement. Because it is not permissible to impeach a defendant's opening statement, the prosecutor would have had no way to inform the jurors that the version of the shooting that respondent gave to them in his unsworn testimony was not the same version of the shooting that he had given to the police. In essence, respondent would

have been allowed to pervert "The shield provided by Miranda . . . into a license to use [unsworn] perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." Harris, 401 U.S. at 226.

A defendant in a criminal proceeding in the Commonwealth of Kentucky is allowed, pursuant to its procedural rules, to present to the jurors unsworn testimony in the opening statement. When a defendant chooses to do so, and gives a different version of his involvement in the crime to the jurors than the one he gave to police in a Miranda-violative confession, the state should be allowed to introduce the Miranda-violative confession as impeachment evidence. Amici contend that it is a logical extension of the rule set forth by this Court in Harris v. New York to allow such impeachment evidence. To refuse to apply the Harris rule to cover such a situation

is to allow a defendant to avail himself of the benefits of a state's rules of criminal procedure for the purpose of subverting the basic purpose of a criminal trial, which is to determine the truth concerning the guilt or innocence of a defendant. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). Extending the Harris rule to such a situation would not prejudice a defendant. He would still be allowed to avail himself of the opportunity to address the jurors by making his own opening statement. Only if he attempted to mislead them, as respondent did in the present case, would the state be allowed to introduce Miranda-violative statements to set the record straight.

The Commonwealth should have been allowed to impeach the claims respondent made in his opening statement, which was tantamount to unsworn trial testimony, with any inconsistent statements that he

had made to the police in his Miranda-violative confession. Since admission of the confession would have been proper for impeachment purposes, its admission was clearly harmless beyond a reasonable doubt under Chapman v. California, or any other harmless-error test.

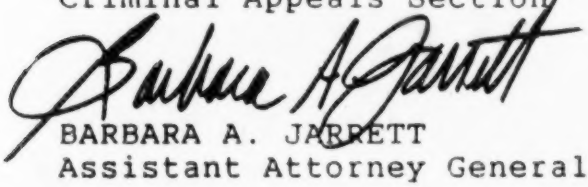
CONCLUSION

For all the preceding reasons, amici request this Court to grant the petition for writ of certiorari for the purpose of resolving the issues raised in the petition and in this amici curiae brief.

Respectfully submitted,

GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section



BARBARA A. JARRETT
Assistant Attorney General

Attorneys for AMICI CURIAE

CRM 90-0005
6389D